IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25-02-2005

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA

WRIT PETITION NO.9368 OF 2004

M/s. Bothra Traders,
represented by its Proprietor
Bhawarlal H. Bothra
No.1, 10th Street, Jothi Nagar,
Thiruvottiyur, Chennai 19. .. Petitioner

Vs.

Bharat Petroleum Corporation Ltd.,
rep. by its Chief Materials
Manager, South,
1, Ranganathan Gardens,
Off. 11th Main Road, Anna Nagar,
Chennai 600 040. .. Respondent

Petition filed under Article 226 of the Constitution of India for the issuance of Writ of Certiorarified Mandamus as stated therein.

For Petitioner : Mr.G. Anbumani

For Respondent : Mr.K. Ethiraj

J U D G M E N T

The prayer in the present writ petition is for issuing a writ of Certiorarified Mandamus, calling for the records of the respondent culminated in its proceedings No.M/M/SR/DISP/2003-04/16(P)/(A) dated 25-03-2004 and to quash the same and further directing the respondent to issue Letter of Acceptance and award the Tender dated 4.11.2003 to the petitioner.

2. The petitioner is engaged in the business of dismantling and trading of scrap iron and steel items. The respondent, Bharat Petroleum Corporation Limited, issued a notice inviting tenders for dismantling/uplifting of the complete structures/facilities/materials located at Hubli Depot of the respondent-Corporation. The due for

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opening of the tender was 4.11.2003. Notes 11, 12 & 13 to Annexure-I and Condition No.8 to Annexure-III of the Tender call notice are to the following effect :-

" NOTES:

11. EMD for the above will be 10% of the quoted value by way of crossed Demand Draft drawn on a Nationalised / Scheduled Bank in favour of Bharat Petroleum Corporation Ltd., Chennai, payable at Chennai. Your Offer will be summarily rejected if not accompanied by the EMD or if quoted for part quantities. No cheque will be accepted.

12. EMD of the highest bidder will be held with us. EMD of the other parties will be refunded within 10 days from the date of tender opening either by returning the same draft issued by them or by way of fresh cheque issued by us.

13. Full payment exclusive of EMD for the above material indicated above is to be made in one instalment within 15 days from the date of receipt of Letter of Acceptance by way of crossed DD drawn on a Nationalised / Scheduled Bank in favour of Bharat Petroleum Corporation Ltd. Chennai, payable at Chennai. On receipt of full payment we shall issue the "LETTER OF AUTHORITY" to clear the entire lot."

" ANNEXURE III

8. An Earnest Money Deposit as mentioned in the 'schedule of materials' must accompany each tender. The required amount must be paid by any Nationalised / Scheduled Bank Demand Draft drawn in favour of 'Bharat Petroleum Corporation Limited' payable at Chennai duly crossed and superscribed "Account Payee Only". Tenderers without Bank Draft as above are liable to be rejected outright. Tenders accompanied by Cheques as Earnest Money Deposit will not be accepted. No interest is payable for the deposit amount held by us. The EMD of the highest bidder will be retained by us. The successful tenderer will be advised outcome of the tender by a "letter of acceptance" and his earnest money will be refunded on completion of the job to the full satisfaction of the company. The EMD of other parties will be refunded within 10 days of tender opening by way of returning the same DD or by way of fresh cheque issued by us."

3. It is the case of the petitioner that he has submitted his tender along with Earnest Money Deposit for Rs.5,00,000/- as per the requirement. It is his further case that when the tenders were opened on 4.11.2003, the officials of the respondent opened each and every

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bid and read out the quoted value of each bidder except that of one M/s.Mohammed Ali Industries, Vijayawada, who has not furnished EMD. The officials of the respondent who conducted the tender on 4.11.2003 informed that the offer of the said M/s. Mohammed Ali Industries was rejected for non-furnishing of the EMD and it was declared that the petitioner was the highest bidder. Subsequently, the respondent had returned the EMD of other bidders as per Clause 12 of the condition in Annexure-I except the EMD of the petitioner, as the petitioner's bid was the highest. The respondent assured that the letter of acceptance contemplated under Clause 13 would be issued to the petitioner after obtaining clearance from the Head Office. The petitioner believed the words of the respondent. The petitioner made repeated calls to the respondent requesting for issuance of letter of acceptance to enable him to make the entire payment, exclusive of the EMD already deposited. However, the respondent evaded the calls and the personal visits of the petitioner to the office of the respondent proved futile. Ultimately, the petitioner received the impugned communication dated 25.3.2004. The relevant extract of the said communication is to the following effect:-

> "... Since the highest bidder pursuant to the subject tender, after acceptance of their offer, failed and neglected to perform their obligation under the Agreement, fresh offers are being invited from intending bidders on the terms and conditions a copy which is enclosed herewith. The new tender documents can be had from us against the Press Tender which be appearing in News papers shortly.
>
> Since pursuant to the subject tender, you have already submitted an EMD of Rs.5,00,000/-, if you decide to submit your offer pursuant to this letter and against the new tender (M/M/SR/DISP/2003-04/16(P)/(A)), you will be required to submit an EMD, subject to a maximum of Rs.10,00,000/- for the differential amount only, if any, i.e. 10% of the price quoted pursuant to this letter and against the above said Press tender, less the sum of Rs.5,00,000/- already paid by you."

4. In such communication, the respondent also enclosed the terms and conditions of the new tender, wherein the condition relating to filing of EMD was modified and exemption was contemplated in respect of SSI Units.

5. It is the contention of the petitioner that the petitioner's offer being the highest bid from among the eligible bidders, should have been accepted. It is also submitted that as a matter of fact, the respondent and its officials had indicated that the petitioner's bid was to be accepted and that is the reason for retaining the EMD of the petitioner while the EMD of all other bidders were returned by the respondent. It has been submitted that the procedure adopted by the

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respondent is opposed to public policy and the respondent "... with mala fide intention to help someone is indulging in such arbitrary, whimsical and unreasonable action." It has been submitted that the action of the respondent in inviting fresh tender is wholly arbitrary and the communication sent to the petitioner should be quashed and a direction should be issued to the respondent to issue contract to the petitioner.

6. A counter affidavit has been filed on behalf of the respondent. In such counter affidavit, the assertion of the petitioner that the bid of M/s. Mohammed Ali Industries was rejected on 4.11.2003, as no EMD has been furnished, has been specifically denied. On the other hand, it has been indicated that in the bid of M/s.Mohammed Ali Industries, it has been indicated that it being an SSI Unit, was exempted from depositing the EMD. It is further stated that the petitioner was not declared as a successful bidder, however, EMD of the petitioner was not returned inadvertently even though the EMD of other successful bidders were returned. It is however categorically denied that at no point of time, the petitioner was given any assurance that his bid being the highest, would be accepted. It is further indicated that there were several correspondence and discussions between M/s. Mohammed Ali Industries, the highest bidder, and the respondent regarding mode of payment of the entire amount, but ultimately M/s. Mohammed Ali Industries failed to perform its part of the obligation. It is further indicated that since M/s. Mohammed Ali Industries had quoted Rs.1.71 Crores as against only Rs.46,11,600/- quoted by the present petitioner, the respondent thought it fit to cancel the tender and issue fresh notice inviting fresh tender in order to ensure maximum benefit with the Corporation.

7. A reply affidavit has been filed on behalf of the petitioner, wherein the statements made in the writ petition have been reiterated and the statements made in the counter affidavit of the respondent have been refuted.

8. In the aforesaid background, learned counsel for the petitioner has contended that as per Note No.11 of the Annexure-I to the tender papers and paragraph 8 of the Annexure-III, any offer without EMD is liable to be rejected summarily, and therefore, the offer of M/s. Mohammed Ali Industries should not have been considered as the highest bid and the petitioner's bid being the highest eligible bid, should have been accepted. It is further submitted that the very fact that the EMD of the petitioner was retained itself is indicative of the fact that the offer of the petitioner was accepted, or otherwise, the respondent would have refunded the EMD as incorporated in Note No.12 of Annexure-I.

9. It is of course true that in the notice inviting tenders and in the conditions included in the tender paper, it has been clearly indicated that the tenders will be rejected unless accompanied

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by EMD as required. However, as rightly pointed out by the learned counsel for the respondent, in view of the decision of the Central Government, contemplating exemption of filing of EMD in respect of SSI Units as communicated by letter dated 31.5.1984, the offer of M/s. Mohammed Ali Industries was not rejected and as a matter of fact, recommendation was made for acceptance of such offer subject to certain conditions. This submission is borne out by the statement made in the counter affidavit as well as from the file produced by the respondent. Minutes of the auction indicate that the offer of M/s. Mohammed Ali Industries was considered as the highest bid and the bid was recommended for acceptance and the payment regarding EMD was not insisted upon at that stage. It is of course true and rather unfortunate that in the conditions or in the notice inviting tender, it has not been indicated that SSI Units are not required to furnish EMD, but the petitioner cannot be said to be aggrieved by such omission. On the other hand, if the bid of an SSI Unit would have been rejected only on the ground of non-furnishing of EMD, such SSI Unit could challenge the decision of the respondent as per the policy decision of the Central Government dated 31.5.1984.

10. Learned counsel for the petitioner has vehemently contended that the offer of the petitioner had been accepted which is evident from the fact that his EMD had not been returned. Even though, prima facie, the retention of such EMD by the respondent supports such contention, merely by such action, it cannot be conclusively held that the offer of the petitioner was accepted. Explanation of the respondent that inadvertently the EMD has been retained, appears to be hollow. It cannot be said that there was any concluded contract between the petitioner and the respondent. May be that by retaining the EMD, the respondent had given rise to certain expectation in the mind of the petitioner regarding acceptance of his bid. However, such expectation does not give rise to right to claim issuance of writ of mandamus to direct the respondent to accept the offer of the petitioner, particularly, when the respondent, a pubic sector undertaking is likely to incur some loss. The entire process had been cancelled and a fresh tender is being invited. Therefore, the present petitioner would have ample opportunity to participate in the tender process afresh and to that extent, it cannot be said that the petitioner has been denied of any enforceable right. Even though the respondent could have acted in a more responsible manner, merely because of some inaction or negligence on the part of the respondent, it would not be proper to issue writ of mandamus, directing the respondent to enter into a contract with the petitioner.

11. Learned counsel for the petitioner has relied upon several decisions in support of his contention that an appropriate writ should be issued. More particularly, he has placed reliance upon the decision of the Supreme Court reported in (1986) 3 SCC 247 (HARMINDER SINGH ARORA v. UNION OF INDIA AND OTHERS). In the aforesaid decision, the authorities invited tenders for supply of

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fresh buffalo or cow milk for the Military Farm. The bid of the appellant, which confirmed to the requirement of the tender, was the lowest bid and the bid of the General Manager, Government Milk Scheme was for pasteurised milk instead of fresh buffalo or cow milk with 4% fat and with specific gravity of 1.029. The concerned officer of the Military Department submitted a report that the bid of the appellant was the lowest and purchase of milk from the appellant would be profitable while the purchase of milk from Respondent No.4 would result in serious loss. The policy of the Government of India, which came into exercise after issuance of the tender notice, regarding giving 10% price preference to Government undertakings came later on and moreover, the price quoted by the appellant remained lower than the price quoted by Respondent No.4 and yet the tender of Respondent No.4 was accepted. In these circumstances, the writ petition filed by the appellant was dismissed by the High Court. However, the Supreme Court reversed the decision of the High Court and issued a direction for awarding contract to the appellant holding that the action of the authorities was arbitrary and capricious. It is also indicated that the offer of Respondent No.4 was not in conformity of the tender notice and should not have been accepted and at any rate the appellant should have been given an opportunity to submit the tender with the changed terms.

12. I do not think the ratio of the aforesaid decision can be made applicable to the facts of the present case. In the present case, the petitioner was not the highest bidder. The highest bid of another bidder which was a SSI Unit was exempted from submitting EMD as per the policy of the Government of India, Ministry of Industry. By no stretch of imagination it can be said that the respondent acted arbitrarily in not insisting upon the EMD for M/s. Mohammed Ali Industries.

13. Learned counsel for the petitioner has also relied upon a decision of the Supreme Court reported in AIR 1988 SC 2035 (M/s. PRESTRESS INDIA CORPORATION v. U.P. STATE ELECTRICITY BOARD AND OTHERS). In the said decision, the High Court, after coming to a particular conclusion, directed the respondent to place order with the appellant in respect of half of the quantity indicated in the tender notice. In appeal, the Supreme Court modified the order of the High Court and held that in view of the findings and direction given by the High Court there is no justification in placing order for 50% and the Electricity Board was directed to accept the tender in respect of the entire quantity.

I hardly see any applicability of the aforesaid decision to the facts of the present case.

14. Learned counsel for the petitioner has also relied upon the decision of the Supreme Court reported in (2002) 6 SCC 315 (KANHAIYA LAL AGRAWAL v. UNION OF INDIA AND OTHERS). In the said case, the

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first respondent had invited tenders for execution of certain works. The appellant had made his offer with a covering letter that if his offer is accepted within a particular period rebate would be offered by him. A similar offer was made by Respondent No.5 not at the time of making the bid, but after five days of the opening of the tender. The authorities had accepted the offer of the appellant which was challenged by Respondent No.5 by filing writ petition. Learned single Judge took the view that the tender notice did not admit of an offer being made in the form of rebate as has been offered by the appellant and issued a direction for taking fresh offers from the appellant and Respondent No.5. The Division Bench held that in the absence of any such condition in the tender, no conditional offer could have been made and therefore, the offer of Respondent No.5, which was at the lower rate should have been accepted and accordingly issued a direction. The matter came up before the Supreme Court, which observed as follows :-

> "5. This Court is normally reluctant to intervene in matters of entering into contracts by the Government, but if the same is found to be unreasonable, arbitrary, mala fide or is in disregard of mandatory procedures it will not hesitate to nullify or rectify such actions.
>
> 6. It is settled law that when an essential condition of tender is not complied with, it is open to the person inviting tender to reject the same. Whether a condition is essential or collateral could be ascertained by reference to the consequence of non-compliance thereto. If non-fulfilment of the requirement results in rejection of the tender, then it would be an essential part of the tender otherwise it is only a collateral term. This legal position has been well explained in G.J. Fernandez v. State of Karnataka."

The Supreme Court while reversing the decisions of the High Court and dismissing the writ petition held that there is nothing illegal or arbitrary in accepting the tender of the appellant which was made at the time of submitting the tender itself.

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This decision is again not very helpful to the petitioner in the facts and circumstances of the present case.

15. The principle relating to issuance of writs in the matter relating to acceptance of offers is now well settled, particularly in view of the decision of the Supreme Court in (2000) 2 SCC 617. The aforesaid decision along with other decisions were collated and analysed in the decision reported in 2005 (1) CTC 81 (S. SELVARANI v. THE

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COMMISSIONER, KARAIKUDI MUNICIPALITY, KARAIKUDI AND ANOTHER). The main question was as to whether the action of the authority is said to be arbitrary. In the present case, keeping in view the fact that bid of another bidder was much higher and the matter was being negotiated with such highest bidder which was claiming exemption regarding submitting of EMD on account of the Government policy, it cannot be said that the action of the respondent in not accepting the bid of the petitioner and not awarding contract to the petitioner is arbitrary and particularly when the respondent has not awarded the contract to any lower bidder and decided to issue fresh tenders. In view of the aforesaid conclusion, the main relief claimed by the petitioner cannot be granted.

16. The above is of course is not the end of the matter. The petitioner had deposited EMD in November, 2003. As per the terms and conditions if the bid is not accepted the EMD is required to be returned by the respondent within 10 days. In other words, at least, such amount should have been refunded to the petitioner at the end of November, 2003. Whatever might have been the reasons for the respondent in not returning the amount, the petitioner cannot be made suffer for such unauthorised action of the respondent. The EMD has remained with the respondent for a pretty long period, from November, 2003. It is obvious that the petitioner has incurred loss in the shape of interest on such heavy amount. Keeping in view the rate of interest, I think, interest of justice would be served by directing the respondent to refund such amount with interest at the rate of 15% to be calculated from 1st January, 2004. This direction should be complied with within a period of 30 days from the date of receipt of the order. Since the petitioner had been forced to approach the Court for no fault of his, the respondent is also directed to pay a sum of Rs.5,000/- as costs of the litigation.

17. The writ petition is accordingly disposed of, subject to the aforesaid directions.

Sd/

Asst.Registrar

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Sub Asst.Registrar

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To

The Chief Materials Manager,
Bharat Petroleum Corporation Ltd.,
South,1, Ranganathan Gardens,
Off. 11th Main Road,
Anna Nagar,
Chennai 600 040.

one cc Mr.G.Anbumani, Advocate SR.9016

one cc to Mr.K.Ethiraj, Advocate SR.9024.

WP.9368 of 2004

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